No. 16-1140

In The Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm that litigates in state and federal courts nationwide in defense of private property rights, educational choice, economic liberty, and free speech. Much of the Institute's free-speech practice centers on protecting individuals' right to speak over the objections of various state or local licensing authorities. *See, e.g.*, *Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015) (challenge to state regulation prohibiting licensed veterinarian from emailing advice about animals he had not personally examined); *Edwards v. Dist. of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (challenge to municipal ordinance forbidding unlicensed tour guides from speaking to paying customers about certain topics).

While none of the Institute's clients speak about pregnancy- or abortion-related topics, all of their rights are at risk here because the Ninth Circuit resolved this case by applying its "professional speech" doctrine. This doctrine, which is wholly unmoored from this Court's free-speech jurisprudence, gives licensing authorities tremendous power to trammel the speech of ordinary citizens—power that, in the experience of the Institute's clients, is prone to just as much abuse as any other governmental power to censor. The Institute therefore files this brief to urge the Court to reject the

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[1] Pursuant to Rule 37.6, *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amicus* itself provided any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

Ninth Circuit's jurisprudential invention and to reaffirm that the First Amendment provides Americans with the same free-speech protections against licensing authorities that they enjoy against any other government agent.

SUMMARY OF ARGUMENT

This Court's modern free-speech jurisprudence favors bright lines between protected and unprotected speech: Speech is fully protected unless it falls into certain narrow, historically grounded categories (like obscenity or true threats), and the degree of skepticism the Court applies to speech restrictions similarly depends on easily administrable tests like whether a law's penalties are triggered by speech with a particular content. Not only has this Court refused invitations to recognize new exceptions to the First Amendment, it has expressly cautioned that courts do not have "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010); *accord United States v. Alvarez*, 567 U.S. 709, 722 (2012) (noting that strict scrutiny applies to content-based speech restrictions in the absence of "persuasive evidence that a novel restriction on content is part of a long . . . tradition of proscription" (internal quotation marks omitted)).

This caution, however, is hard to discern in the proceedings below, where both parties have consistently

urged the courts to abandon long-standing doctrine in favor of a rule of law that would be more congenial to their position. The Court should reject these arguments entirely and resolve this case by applying its long-standing doctrines about compelled speech.

First, this Court should reject the idea (which was dispositive below) that the appropriate level of First Amendment scrutiny is somehow reduced when a speaker can be characterized as a "professional." This notion has no footing in this Court's precedents. Quite the opposite: Every single time this Court has had occasion to address the speech of "professionals," it has treated such speech just like any other speech. The doctrine advanced below replaces this simple rule with a complicated inquiry into whether a speaker counts as a "professional" in a particular context. Moreover, this doctrinal innovation is unnecessary. The "professional speech" doctrine that played so large a role in the proceedings below inserts these new complexities into First Amendment doctrine without adding anything of value.

Second, this professional-speech doctrine is affirmatively dangerous. *Amicus* recognizes, of course, that this case arises in the context of pregnancy- and abortion-related speech where tempers run high and consequences are serious. But the "professional speech" rules applied below (and sure to be urged by Respondents here) would apply far beyond the specific parties before the Court. According lesser protection to the "professional" speakers here would mean reduced protection for newspaper columnists, tour guides, bloggers

and many others who have been menaced with regulation and censorship of their assertedly "professional" speech. The Court should take great care not to inadvertently endorse the consequences of the Ninth Circuit's doctrine, which has resulted in (among other things) a $1,000 fine against a citizen for providing testimony and reports at a public hearing of a government body without holding the proper license to opine.

Third and finally, the Court should reject any suggestion that the Petitioners here must be treated differently because they do not directly charge for their services. While Petitioners have suggested that the First Amendment analysis must be informed by their nonprofit status, the Ninth Circuit was right to reject these arguments: Once again, this Court has well-reasoned and long-standing doctrine on point, and the Court should simply follow established law rather than indulging in unnecessary innovation. A speaker's First Amendment protection does not ratchet up or down depending on whether he is paid to speak; any rule to the contrary would be both wrong and utterly impossible to administer.

ARGUMENT

I. The "professional speech" doctrine advanced below is a doctrinal innovation squarely at odds with this Court's precedents.

This Court has repeatedly held that courts are not free to create new exceptions to the free-speech

protections of the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 722 (2012) ("Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription" (internal quotation marks omitted)); *accord United States v. Stevens*, 559 U.S. 460, 472 (2010). These holdings have been disregarded in the proceedings below; instead of resolving the case at bar based on this Court's long-standing free-speech jurisprudence, the Ninth Circuit resolved it based on a speech-restricting doctrine of its own devising. Because this doctrinal innovation has no basis in this Court's decisions, it should be rejected, and this case should instead be resolved by applying ordinary compelled-speech analysis.

The court below did *not* engage in ordinary compelled speech analysis; instead, it expressly grounded its holding on the "professional speech" doctrine first articulated by the Ninth Circuit in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).[2] Pet. App. 28a–32a. Under that doctrine, "speech that occurs between a professional and a client is distinct from other types of speech" and entitled to less First Amendment protection because

[2] *Pickup*'s invention of the "professional speech" doctrine sparked a dissent from Judge O'Scannlain, who noted that "[t]he Supreme Court has chastened us lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply[, b]ut that is exactly what the panel's opinion accomplishes in this case[.]" *Pickup*, 740 F.3d at 1221 (O'Scannlain, J., dissenting from denial of rehearing en banc).

"professionals, 'through their education and training, have access to a corpus of specialized knowledge that their clients usually do not' and [their] clients put 'their health or their livelihood in the hands of those who utilize knowledge and methods with which [they] ordinarily have little or no familiarity.'" Pet. App. 29a. As such, the Ninth Circuit holds, the speech of a professional must be placed on a "continuum" with a professional's "public dialogue" at one end and a professional's "professional conduct" at the other, with other kinds of professional-client speech falling somewhere in the middle and receiving only intermediate scrutiny. Pet. App. 28a.

This doctrine is wrong, and it should play no role in the Court's resolution of this case. It is squarely at odds with this Court's controlling precedents; it introduces unnecessary (and potentially insoluble) questions into the constitutional analysis; and it is, in any event, an unnecessary innovation that achieves no worthwhile end.

As an initial matter, the doctrine is simply irreconcilable with binding precedent: There is no "continuum" between speech and conduct for First Amendment purposes. A law (as applied) regulates speech or it regulates conduct, and this Court has given simple instructions in how to differentiate the two.[3]

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[3] To be sure, some *conduct* is expressive conduct and entitled to greater First Amendment protection. *See United States v. O'Brien*, 391 U.S. 367, 376–77 (1968); *accord Texas v. Johnson*, 491 U.S. 397, 406–07 (1989). But that is a far cry from saying, as the

The most instructive case here is *Holder v. Humanitarian Law Project*, in which the Court confronted a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorist groups. 561 U.S. 1, 7–11 (2010). The plaintiffs in that case wanted, among other things, to provide "train[ing] [to] members of [the Kurdistan Workers' Party (PKK)] on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 14–15. They wanted, in other words, to use their expertise to provide individualized advice to particular people or groups.

The Court rejected the plaintiffs' contention that the law had "banned their 'pure political speech,'" noting that the plaintiffs remained free to engage in whatever political advocacy they wished as long as they did not engage in speech directly to or under the direction of a terrorist organization. *Id.* at 25–26. But it also rejected the government's position; the government had argued that the case should be resolved under intermediate scrutiny because the underlying law was aimed at conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore only incidentally burdened the plaintiffs' expression. *Id.* at 26 (citing *O'Brien*, *supra*).

Ninth Circuit has, that some *speech* can be downgraded into sort-of-conduct and thereby stripped of First Amendment protection.

Instead, the Court reiterated and clarified its long-standing test for whether a law is a regulation of speech or a regulation of conduct: If, as applied to a plaintiff, "the conduct triggering coverage under the statute consists of communicating a message," then it is a restriction on *speech* and must be analyzed as such. *Id.* at 28. The Court's analysis of the issue was straightforward and practical:

> [The law] regulates speech on the basis of its content. Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 27 (citations omitted).

This practical analysis is simply irreconcilable with the way the court below approached this case. Instead of asking whether a law is directed at or triggered by speech, the Ninth Circuit asks what *kind* of speech is at issue: whether it requires "access to a corpus of specialized knowledge" or whether a speaker uses methods or knowledge with which their listeners would "ordinarily have little or no familiarity." Pet. App. 29a. This is error. *Cf. Pickup v. Brown*, 740 F.3d 1208, 1216–18 (9th Cir. 2014) (O'Scannlain, J., dissenting

from denial of rehearing en banc) (arguing that the Ninth Circuit's "professional speech" doctrine is contrary to the holding of *Humanitarian Law Project*).

Beyond being inconsistent with binding precedent, these new criteria do not lend themselves to straightforward or predictable analysis, as evidenced by the strange permutations the "professional speech" doctrine has created in the Circuits that have attempted to apply it. *See, e.g.*, *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (holding that the "professional speech doctrine" applies to fortune tellers); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (applying strict scrutiny to a policy that sought "to punish physicians on the basis of the content of doctor-patient communications").

Worse, the entire premise of the inquiry is simply backwards: Courts generally do not investigate whether a speaker has *too much* knowledge such that her speech will be *too persuasive* and overwhelm an unsophisticated listener. Certainly this Court has never endorsed such a proposition. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."). To the contrary, unprotected speech is generally unprotected precisely because it is *unpersuasive* and unlikely to aid in any search for truth. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (justifying exclusion of obscenity, libel, fighting words, and other "well-defined and narrowly limited classes of speech" from First Amendment protection because "such utterances . . . are of

such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

These problems with the "professional speech" doctrine are, perhaps, why this Court has never felt the need to invoke it, despite a long history of reviewing First Amendment challenges to speech by professionals. The closest the doctrine comes to having any footing in this Court's cases is Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 211–36 (1985) (White, J., concurring). In that opinion, Justice White posits that there is a difference between the "regulation of a profession" and "prohibitions on speech," and that the line between the two is whether someone "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances[.]" *Id.* at 232 (White, J., concurring). But Justice White's proposed rule has never been adopted by this Court; indeed, in the three decades since *Lowe*, it has not been approvingly cited by even a single Justice. To the contrary, the Court has expressly rejected the proposition that occupational licensure that affects speech is "devoid of all First Amendment implication" or "subject only to rationality review." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13 (1988).

Instead, this Court consistently treats speech by professionals the same way it treats any other speech. Sometimes, for example, the Court confronts restrictions on professionals' commercial solicitations, and it treats these restrictions much like other restrictions

on commercial solicitations: Where they are supported by sufficient evidence, they are upheld. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978) (upholding restriction on in-person solicitation by lawyers based on record of long-standing prohibitions on the practice and dangers it posed to consumers). Where they are not so supported, they are struck down. *E.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770–73 (1993) (declining to extend *Ohralik*'s holding to accountants in the absence of comparable record evidence).

This Court generally treats speech from professionals the same as it treats other speech because, quite simply, there is no need to do otherwise—and therefore no need for the doctrinal innovation of "professional speech" in the first place. The concerns that animate Justice White's original concurrence in *Lowe* obviously center around foreclosing First Amendment challenges to the licensure of financial professionals, attorneys, and the like. And, indeed, academic defenders of the "professional speech" doctrine generally proceed from the assumption that the doctrine's absence would require the wholescale deregulation of lawyers or doctors. *See generally* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165 (2015) (invoking the specter of lawyer deregulation in response to a D.C. Circuit opinion invalidating a law licensing tour guides). But these concerns are obviously misplaced: Most applications of most state licensing laws will have no First Amendment implications at all. These licensing laws will apply, largely, to conduct. Financial advisers take money from

their clients to invest on their behalf; doctors perform surgeries; lawyers prepare and file binding legal documents. Even when professionals' work involves speech, the First Amendment is not necessarily implicated. Lawyers' briefs are *speech*, to be sure, but federal courts are not public forums in which individuals have any right to engage in such speech. Similarly, a doctor writing a prescription certainly writes words on a piece of paper, but the government's regulation of that act has nothing to do with the communicative aspect of the writing and everything to do with its *legal effect* (which gives someone the legal right to access controlled substances).

The only thing the "professional speech" doctrine adds is the state's ability to prevent individuals from engaging in pure speech (without any regulable conduct).[4] But it is far from obvious that government officials *need* (or can be trusted with) the power to prohibit people from saying things like "you should eat less sugar" or "you should take away your rebellious teen's smartphone"—both statements of the sort that, as discussed in Section II below, government officials have

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[4] Significantly, the professional-speech doctrine would only be necessary to allow the advance prohibition of such speech, not to allow punishment of certain speech that results in harm. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 718–19 (2012) (noting that false statements that create a "legally cognizable harm" can be punished consistent with the First Amendment); *cf.* Paul M. Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. 183, 195–96 (2015) (noting that actions for medical and legal malpractice predate both licensing requirements and the First Amendment itself and therefore presumably are not barred by the First Amendment).

already tried to prohibit under the guise of "professional speech."

The "professional speech" doctrine relied upon below is wrong as a matter of law. It articulates a standard that will, in practice, prove nearly impossible to administer. And it does so while providing no useful additions to this Court's existing jurisprudence. The Court should reject it entirely and decide this case as an ordinary compelled-speech question.

II. According less First Amendment protection to Petitioners because they are "professionals" would threaten the rights of speakers nationwide.

This case arises in a controversial context: pregnancy centers (many of which are state-licensed) providing controversial services that have the effect (indeed, the purpose) of deterring people from exercising their legal right to obtain an abortion. But any decision from this Court will have doctrinal implications far beyond this context. To the extent the Court does not reject the idea of a "professional speech" doctrine outright, it should proceed with caution to avoid inadvertently stripping free-speech protection from millions of Americans.

As an initial matter, any doctrine announced in this case will necessarily apply to speech by licensed and unlicensed speakers alike. To be sure, some lower courts have held that the doctrine applies only to limit the speech rights of individuals who hold a government

license. *See Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, No. 16-2325, 2018 U.S. App. LEXIS 297, at *14 & n.2, 2018 WL 298142, at *4 & n.2 (4th Cir. Jan. 5, 2018) (distinguishing the instant case on the grounds that this case involves "clinics licensed by the state," to which the professional-speech doctrine applies, and holding that it cannot apply to unlicensed clinics). But this cannot be right: Individuals cannot be compelled to sacrifice their rights to engage in otherwise protected speech in exchange for a government license, and this Court has already held exactly that. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996) ("That the State has chosen to license its liquor retailers does not change the [First Amendment] analysis."). Thus, if Petitioners can be compelled to speak because they are "professionals," anyone could be compelled to speak—or prohibited from speaking—in similar circumstances, whether they hold a state license or not.

Neither could a ruling in this case be easily confined to the pregnancy (or even the medical) context. As noted *supra*, the boundaries of "professional speech" are exceedingly difficult to draw with any certainty, and any reduction in First Amendment protection for "professionals" will inevitably bleed over into more fields than the Court anticipates.

And, indeed, this is exactly how the "professional speech" doctrine has played out in lower courts. Government officials have (with varying degrees of success) invoked the doctrine to justify silencing unlicensed

tour guides,[5] fortunetellers,[6] and even advice columnists.[7]

Unsurprisingly, government officials armed with the power to silence speech have used that power against speech expressing minority or unpopular opinions. When North Carolinian Steve Cooksey challenged conventional dietary wisdom by publicly advocating for a low-sugar, low-carbohydrate "Paleolithic" diet, speaking out in public and operating an internet site on the subject, he triggered an investigation by the state's Board of Dietetics/Nutrition. *Cooksey v. Futrell*, 721 F.3d 226, 230–32 (4th Cir. 2013). The Board eventually sent him a "red-pen review" of his website highlighting the statements it claimed he was not allowed to make without being a licensed dietician. *Id.* at 232. And this instinct for censorship is not confined to administrative officials: When the Florida legislature heard stories of doctors discussing gun ownership with their patients "to satisfy a political agenda," it passed a law forbidding physician inquiries about gun ownership outright. *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1302 (11th Cir. 2017) (en banc).

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[5] *Edwards v. Dist. of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014).

[6] *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013).

[7] *Rosemond v. Markham*, 135 F. Supp. 3d 574, 583–84 (E.D. Ky. 2015) (rejecting government's argument that the professional-speech doctrine applied to a newspaper columnist who had urged a letter writer to discipline her wayward son by taking away his smartphone).

To be clear, these examples are only those that have found their way into the federal courts (and generally only because the speakers in question have found pro bono counsel to help them fight back against the government's assertions of power). The true mischief worked by the "professional speech" doctrine is far less visible from a simple survey of federal-court decisions. In 2015, for example, the Oregon State Board of Examiners for Engineering and Land Surveyors assessed a $1,000 fine against a private citizen for submitting technical testimony at a public meeting without a license, ruling that his "reports, commentary and testimony" were the acts of a "professional" and thus "clearly not protected speech." Final Order by Default at 16–17, *In the Matter of Dale La Forest*, Case No. 2697 (Aug. 14, 2015) (citing *Lowe*, 472 U.S. at 228), *available at* http://ij.org/wp-content/uploads/2017/04/OR-Math-La-Forest-Default-Order-IJ083240xA6322-1.pdf (last visited January 11, 2018).

These examples illustrate that this Court has been correct to avoid creating new categories of less-protected speech. Removing First Amendment protection from entire categories of speech does far more than uphold a particular speech restriction that seems necessary in given circumstances; it empowers whatever faction holds power at a given point in time to demand ideologically congenial speech or silence disfavored speech. In the case at bar, one's sympathies for the Petitioners may vary greatly depending on one's underlying views about abortion rights, but the specifics of this case are merely happenstance. There is, after

all, no doubt that giving California authorities the power to regulate the speech of crisis-pregnancy centers under the guise of "professional speech" must perforce give Arizona authorities the power to do the same to abortion providers in that state. *See Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F. Supp. 3d 1075 (D. Ariz. 2016) (challenge by licensed abortion clinics and providers to statute compelling them to convey to their patients a state-mandated message with which plaintiffs disagree).[8] The better course is to do what this Court has historically done and analyze the particular speech restriction at issue by using long-standing, neutral First Amendment doctrines—not by cutting whole swaths of speech loose from the protection those doctrines provide.

Simply put, the "professional speech" doctrine allows the politically powerful to dictate the speech of

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[8] To be sure, saying that the First Amendment *applies* to speech does not mean that a given restriction on that speech fails First Amendment scrutiny. *See* Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 81 (2016) (arguing that requirements that doctors obtain informed consent by explaining medical procedures to patients before performing medical procedures would "fall within a range of 'easy cases' that . . . would survive even strict scrutiny review"). This Court can (and does) uphold speech restrictions it deems justified without feeling the need to announce new categories of less-protected speech. *See Humanitarian Law Project*, 561 U.S. at 28–30 (rejecting First Amendment challenge to material-support restriction under strict scrutiny); *accord Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015) (upholding restriction on judicial solicitation of campaign contributions under strict scrutiny without categorically reducing protection for speech by judges). There is no need to treat the speech of "professionals" any differently.

the politically weak. It does so in the context of pregnancy—but also in the context of diet, psychology, history, and more. It does so in the context of state licensees—but also in the context of unlicensed citizens who simply want to offer their point of view. The doctrinal question in this case affects speech by countless ordinary Americans everywhere from public meetings to personal sites on the internet to one-on-one conversations and advice. To the extent the Court does not reject wholesale the idea of a "professional speech" doctrine, it should make abundantly clear that it is not endorsing the actual doctrine articulated below or any of the rampant abuses thereof.

III. This case does not hinge on whether Petitioners are paid for their services.

Petitioners have argued below and to this Court that any analysis of the regulations at issue here must account for the fact that Petitioners provide their services "pro bono." *E.g.*, Pet. 21–23. It should not. According *greater* free-speech protection to unpaid speakers is synonymous with according *lesser* free-speech protection to paid speakers—and the Court has repeatedly and expressly refused to do this. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("the degree of First Amendment protection is not diminished merely because the . . . speech is sold rather than being given away" (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973))). Indeed, any number of this Court's First Amendment precedents center around

paid speech—speech that this Court has uniformly treated as fully protected. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (book publishing); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (movie theaters); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (paid newspaper advertisement); *accord Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011) ("While the burdened speech results from an economic motive, so too does a great deal of vital expression.").

Of course, this is not to say that an entity's commercial or noncommercial nature is *never* relevant to the analysis—but, under current doctrine, it is only relevant when the government regulates the entity's *solicitations*. *See, e.g.*, *44 Liquormart*, 517 U.S. at 501 (positing that less-strict review is appropriate where "a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices" but not "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process").

This principle explains this Court's decisions in cases like *In re Primus*, 436 U.S. 412 (1978). In *Primus*, this Court rejected a state bar's attempt to sanction an ACLU lawyer for sending solicitations to potential clients because the lawyer was offering uncompensated services. *Id.* at 414–15. But *Primus*, at most, is drawing a distinction between commercial and noncommercial speech, not paid and unpaid speech: A lawyer soliciting a paid client is (at least potentially) engaged in

commercial speech, while a lawyer soliciting a pro bono client is recruiting an ally in political speech rather than proposing a commercial transaction. That case is fundamentally irrelevant here because California is not simply regulating the centers' solicitations. *See, e.g.*, Pet. App. 31a ("the Licensed Notice regulates the clinics' speech in the context of medical treatment, counseling, or advertising"). The State does not, for example, require the centers to make disclosures in the course of advertising their services to prospective customers. Instead, it purports to regulate what the centers say in the course of performing services for people who have already become customers. If the Court signs off on that compulsion, it is signing off on that compulsion in all contexts, regardless of whether the services are paid or unpaid.

Any contrary rule would prove impossible to administer. It is difficult enough to determine whether a given *communication* merely proposes a commercial transaction and thus constitutes commercial speech.[9] A rule that required the Court to divide not just messages but *speakers* into "commercial" and "noncommercial" boxes would multiply these difficulties. After all, many if not most speakers who do not charge their listeners nonetheless draw financial support for their

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[9] *Cf. Nike v. Kasky*, 539 U.S. 654 (2003) (dismissing as improvidently granted a petition for certiorari presenting the question of whether a business participating in public debate could "be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions").

speech from *somewhere*. Charities receive donations; politicians receive contributions; religious figures receive tithes. Even pro bono attorneys can be paid for successful litigation. *See* 42 U.S.C. § 1988(b).[10]

Which of these speakers should be considered paid and which unpaid? This question finds no answer in this Court's precedents because this Court's precedents resolutely refuse to consider whether an individual is speaking from pecuniary motives, from non-pecuniary motives, or (as is probably most often the case) from some mix of the two. So it should be here. Petitioners' arguments to the contrary should be rejected.

CONCLUSION

Despite the controversial underlying subject-matter of this case, the doctrinal innovation at the heart of the Ninth Circuit's opinion below represents a threat to the rights of countless Americans speaking about countless other topics. That innovation should be squarely rejected, and this case should be decided

[10] Indeed, this was the case in *Primus* itself, where the ACLU attorneys stood to recover fees if they were successful—a fact this Court noted and declined to accord any weight. 436 U.S. at 428–31.

in line with this Court's long-standing precedents governing compelled speech.

Respectfully submitted,

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